87-1788

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MASON H. ROSE, V.,

Petitioner,

v.

SUSAN T. FULTZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 26, 1988

QUESTIONS PRESENTED

1. In a diversity action, where the judgment debtor has appealed from an order for the execution sale of his property to the judgment creditor, does the judgment creditor's resale of the property to a non-party third person automatically moot the appeal, ~~or~~ does mootness depend on whether effective relief against the third person and/or the judgment creditor is still possible under the law of the forum state (here California)?

2. In enforcing a money judgment in a diversity action, may a federal district court refuse to follow the homestead and execution laws of the forum state (here California), and order a private execution sale of a family dwelling to the judgment creditor, so she can accept an offer for the resale of the dwelling to a third person?

3. If a judgment debtor cannot afford a supersedeas bond that would entitle him to a full stay on appeal, is he nevertheless entitled to a stay of the execution sale of his family home, by proposing and performing a plain that preserves the equity in the home that will be available for application on the judgment if he loses the appeal?

LIST OF PARTIES

The only parties to the proceeding in the Ninth Circuit Court of Appeals, and in the California District Court from which the appeal to the Ninth Circuit was taken, were those named in the caption of this Petition. They are Petitioner MASON H. ROSE, V and Respondent SUSAN T. FULTZ, a/k/a SUSAN THERESE FULTZ and SUSAN FULTZ-SMALL.

However, this action originated in the United States District Court for the District of Colorado, whose default judgment was registered in California. In addition to Petitioner, there were two other defendants in the Colorado District Court; both were dismissed at Respondent's request, at or before the entry of the default judgment. They were H. L. QUIST and H. L. QUIST MANAGEMENT AND DEVELOPMENT CORP.

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MASON H. ROSE, V, Petitioner

v.

SUSAN T. FULTZ, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner MASON H. ROSE, V ("Rose") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, which dismissed the appeal as moot and was entered on December 11, 1987.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 833 F.2d 1380. That opinion, and the Ninth Circuit's order denying rehearing, are reproduced in Appendix C, commencing respectively at App. 60a and 62a.

The order appealed from to the Ninth Circuit was the "Order Vacating Stay of Execution, Directing Sale of Real Property to Judgment Creditor, and Directing Distribution of Funds Upon Closing," filed on March 7, 1986, in and by the United States District Court for the Central District of California, where the Colorado District Court's default judgment had been registered. That order is unreported, and is reproduced in Appendix B, at App. 44a-51a.

The Colorado District Court's default judgment is unreported, and is reproduced in Appendix B, at App. 58a-59a. [1/]

JURISDICTION

Rose seeks review of the judgment and opinion of the Court of Appeals for the

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[1/] The Colorado default judgment refers to and was accompanied by "Findings of Fact and Order for Default Judgment," not relevant to the present petition, but reproduced in the Appendix to Rose's previous petition in No. 87-1559, at App. 25a-42a.

Ninth Circuit, filed and entered December 11, 1987, dismissing the appeal as moot. A timely Petition for Rehearing was denied on January 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION, RULES AND STATUTES INVOLVED

The provisions involved include (1) the Due Process Clause of the Fifth Amendment to the United States Constitution; (2) Fed. R. Civ. P. 62, relating to the stay of proceedings to enforce a judgment, and in particular Rules 62(d) ("Stay Upon Appeal") and 62(f) ("Stay According to State Law"); (3) Fed. R. Civ. P. 69(a), relating to execution generally, "in accordance with the practice and procedure of the state in which the district court is held"; (4) Fed. R. App. P. 8(a) and (b), relating to stays pending appeal; (5) multiple provisions of the California

"Enforcement of Judgments Law" [Title 9 (of Part 2) of the California Code of Civil Procedure, commencing with section 680.010], including in particular the California homestead and execution laws which Rose contends the District Court refused to enforce; (6) other provisions of the California Code of Civil Procedure, including parts (commencing with section 872.210) of Title 10.5 (of Part 2), relating to the partition of real property, and parts (commencing with section 916) of Chapter 2 (of Title 12 of Part 2), relating to stays of enforcement and other proceedings pending appeal; and (7) California Civil Code section 5120.110, relating to the liability of community property for the debts of either spouse.

In the aggregate, the above provisions are too voluminous to reproduce here, so they are set forth separately, in Appendix A.

STATEMENT OF THE CASE

A. Federal Jurisdiction in First Instance.

Although the present appeal was to the Ninth Circuit from the Central District of California, this case began as a diversity action in the District of Colorado, filed on November 10, 1983 by Respondent SUSAN T. FULTZ ("Fultz").

The jurisdiction of the Colorado District Court was invoked under 28 U.S.C. section 1332, plaintiff Fultz being a citizen of Colorado, defendant Rose a citizen of California, and two other defendants citizens of Arizona. On December 11, 1984, Fultz obtained a default judgment against Rose, from the Colorado District Court, for $464,753.

The jurisdiction of the California District Court was invoked under 28 U.S.C. section 1963, by Fultz' registration of her Colorado judgment in California.

B. Relation of This Petition to Rose's Pending Petition in No. 87-1559.

Rose has previously (on March 16, 1988) filed another petition for certiorari, now pending in this Court as No. 87-1559. The two petitions are from different orders, by different panels of the Ninth Circuit, in different appeals from separate orders of the District Court. 2/ By coincidence, both panels dismissed the appeals as moot (for different reasons), and both denied petitions for rehearing within a few weeks of each other.

The previous petition, in No. 87-1559, relates to an appeal from a 7/15/85 order in which the District Court ruled that the Colorado default judgment was valid, rejecting Rose's jurisdictional challenge based on improper service of process. The Ninth Circuit dismissed the appeal, ruling

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2/ Unless otherwise specified, references herein to "the District Court" are to the California District Court.

it was mooted by Rose's "voluntary general appearance" by filing a postjudgment Rule 60 motion in the Colorado District Court.

The present petition relates to an appeal from a 3/7/86 order in which the District Court refused to follow the homestead and execution laws of California, and ordered a private execution sale of a family dwelling to Fultz as judgment creditor, so she could resell the dwelling to a non-party third person. The Ninth Circuit dismissed the appeal, ruling it was mooted when Fultz resold the dwelling to the third person while the appeal was pending.

The two petitions (and the underlying District Court orders and the appeals from them) are interrelated, but only to a limited extent. If Rose can establish that the Colorado default judgment was void for lack of jurisdiction (either through the

previous petition in this Court, or in some other forum), then the execution order involved in the present petition is also void, as is the sale of the dwelling pursuant to that order.

On the other hand, if Rose cannot establish voidness for lack of jurisdiction, he can still prevail on the present petition, by showing that he is entitled to relief from the order for sale of the dwelling, because of the District Court's refusal to follow California homestead and execution law.

C. Summary of the Most Important Facts.

Rose appealed a federal district court order in this diversity action, for the execution sale of his family dwelling to judgment creditor Fultz. On appeal, Rose contended that, over his and Mrs. Rose's repeated objections, the District Court deliberately refused to follow applicable California homestead and execution laws.

Rose moved in the District Court for a partial stay of execution, limited to a stay of the sale of the dwelling, pending his appeal from the District Court's 7/15/85 order rejecting his jurisdictional challenge. The stay Rose requested was conditioned on his implementation of a plan that he proposed for the preservation of the equity in the dwelling that would be available for application to Fultz' judgment if she prevailed on appeal.

In support of his motion, Rose showed that he could not afford a bond that would have entitled him to a full stay. However, he also showed that he could pay interest, taxes and insurance premiums as required by his proposal, and he fulfilled those conditions during temporary stays granted by the District Court while his motion was pending.

The District Court refused to consider Rose's motion for a partial stay, and also

denied Rose's alternate motion to enforce the homestead laws by releasing the levy (because Fultz had failed to apply for the homestead hearing required before a dwelling could be sold) or setting in motion the required hearing procedures.

Instead, the District Court ordered a private sale of the dwelling to Fultz as judgment creditor, so could accept an offer to resell the dwelling to third persons, although (1) there had never been a public auction sale, as required by California execution laws; and (2) there had never been a homestead hearing or any of the determinations required at such a hearing (such as whether the dwelling qualified as a homestead, and if so what person(s) were entitled to the homestead exemption(s) and in what amount(s), and a determination of a minimum bid based on an estimate of the current fair market value of the property).

Rose filed a timely notice of appeal from the order for the sale of the dwelling, before the sale had been consummated by the execution, delivery and recording of a Marshal's deed to Fultz; all of those events took place after Rose notified both Fultz and the Marshal that the appeal had been filed, and that under California law there was an automatic statutory stay of the order by the filing of the appeal.

A few weeks later, during the pendency of the appeal, Fultz resold the dwelling to third persons. The purchasers were not parties to the action, but they had been present at a District Court hearing on the proposed private sale to Fultz, so they were fully aware of how Fultz acquired the property, and of Rose's contention that such a sale to Fultz was void.

The Ninth Circuit dismissed the appeal as moot, on the ground that Fultz' resale to non-party third persons precluded the

Court from granting any effective relief or reaching the merits of the appeal.

D. Additional Relevant Facts.

Fultz obtained her Colorado default judgment on 12/11/84. On 12/18/84, Fultz recorded an abstract of the judgment with the Los Angeles County Recorder (CR 79 at 23). Under California law (CCP 697.060, CCP 697.310 and CCP 697.340, 3/ App. A at 7a-8a), that recording created a judgment lien, which attached to the Rose home as real property in Los Angeles County, California. The home was owned jointly by Rose and his estranged wife, and Mrs. Rose was living in it with their three minor children.

After registering her judgment in California on 1/17/85, Fultz obtained a writ of execution issued by the District Court

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3/ Citations in this format ("CCP," followed immediately by a number) are to sections of the California Code of Civil Procedure.

on 1/31/85. Because the Rose Home was community property of Mr. and Mrs. Rose, under California law (Civil Code section 5120.110, App. A at 43a), Fultz could and did levy on the interests of both of them, even though Fultz' default judgment was only against Mr. Rose. Acting under written instructions from Fultz, the United States Marshal levied on Rose's interest in the home on 3/21/85, and on Mrs. Rose's interest in the home on 3/29/85.

Fultz' instructions to the Marshal (CR 63, Exs. A and B) failed to comply with CCP 687.010(a) (App. A at 5a), which requires "[t]he judgment creditor [to] give the levying officer instructions in writing [containing] the information needed or requested by the levying officer to comply with the [California Enforcement of Judgments Law)], including but not limited to . . . a statement whether the property is a dwelling" (emphasis added).

Fultz' instructions failed to state that the property was a dwelling, and the Marshal did not give the notice required by California law (CCP 704.750(a), App. A at 21a-22a) in connection with a levy on a dwelling. That section requires the levying officer to notify the judgment creditor "that the property will be released unless," within 20 days, the judgment creditor applies to the court for an order of sale at a homestead hearing to be noticed and conducted in accordance with specified procedures. Fultz never made the required application, nor did the Marshal "release the dwelling" (Ibid.).

The required homestead hearing was never held, despite the repeated protests of Rose and Mrs. Rose. If such a hearing had been held promptly after the levy (as required by CCP 704.770, App. A at 24a), the Rose home would have qualified as a "homestead" (as defined in CCP 704.710(c),

App. A at 18a-19a), and both Rose and Mrs. Rose would have been entitled to the substantive protections of the California homestead laws, [4/] since (1) Mrs. Rose was then Rose's spouse; and (2) the Rose home was then the principal dwelling in which Mrs. Rose had resided continuously at all times on and after 12/18/84 (the date on which Fultz' lien attached to the property).

In August 1985, Fultz attempted to proceed with the execution sale of the Rose home without even notifying Rose's counsel. Instead, on 7/30/85 (soon after the

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[4/] As to Rose, the Rose home would have continued to qualify as a homestead if the determination had been made at any time through at least 10/31/85 (the date on which his divorce from Mrs. Rose became final), and thereafter as well if Fultz' failure to comply with the law (and the resulting delay of the determination) were held to estop her from denying his homestead rights. As to Mrs. Rose, the Rose home would have qualified as a homestead no matter when the determination was made, because she resided there continuously until after the order for sale.

7/15/85 order appealed from in No. 87-1559, rejecting Rose's challenge to jurisdiction), Fultz obtained an ex parte "Order Granting Access to Real Property to Conduct Public Sale Under Writ of Execution" (CR 28); Fultz did not notify Rose of the ex parte application, as required by the District Court's Local Rule 7.18.1, nor did she notify Rose of the order. It ordered the City of Rolling Hills and the Rolling Hills Community Association to permit access to the home to conduct a public auction on 8/22/85; the order provided for service on the city and the association, but not on Rose (CR 28 at 1-2).

The public auction did not take place on 8/22/85 or at any other time. Instead, Fultz ultimately obtained the 3/7/86 order appealed from, which provided for a private sale to her as judgment creditor.

There was no public auction on 8/22/85 because it was aborted at the eleventh

hour. Fultz had advertised that the sale was set for that date, with a minimum bid of $675,000. [5/] Rose's counsel chanced upon the ad in the Los Angeles Times. On 8/12/85, Rose filed a bankruptcy petition under Chapter 11, and immediately notified Fultz' counsel, by telephone, of the filing and the automatic bankruptcy stay.

Nevertheless, Fultz proceeded to advertise the sale (of the interests of both Rose and Mrs. Rose in the home), and her counsel went to the home on 8/22/85, intending to conduct a sale of Mrs. Rose's interest. At the last minute, and at the insistence of Rose's bankruptcy counsel, the United States Attorney advised the Marshal not to proceed.

[5/] Apparently the $675,000 minimum bid was set by Fultz unilaterally. It was not set in accordance with the homestead laws (see, e.g., CCP 704.780, App. A at 26a-27a, and CCP 704.800(b), App. A at 31a), which include provisions designed to protect California homeowners from forced sales of their homes at far less than fair market value.

Rose's bankruptcy automatic stay was short-lived. In the bankruptcy court, Fultz sought and obtained relief from the stay, permitting her to proceed with the sale of the Rose home, subject only to any stay Rose might obtain from the District Court.

Rose did obtain two further stays--both temporary--from the District Court. He first asked for and received an ex parte temporary stay of the sale of the home (to permit him to notice a hearing on a formal motion for a further indefinite stay), on conditions (such as the payment of interest) similar to those of the later stay.

The second temporary stay was granted, for 90 days only, instead of the indefinite stay Rose requested in his formal motion heard 11/25/85. In support of that motion, Rose showed (by declarations) he could not afford a full bond, and he proposed the detailed plan contained in the

11/25/85 order (App. B at 54a-57-a), to preserve his equity in the home.

In opposition to the Motion, Fultz' primary factual contentions were (1) that she needed the money an immediate sale would bring her; and (2) that, notwithstanding the stay, she had employed a real estate agent and obtained buyers (Mr. and Mrs. Hawkins) who had offered to buy the Rose home for $700,000 cash. Rose questioned the relevance of these facts, and also showed the $700,000 offer was far below the $800,000 appraisal that had been submitted by Rose (as well as the $765,000 appraisal submitted by Fultz) to the bankruptcy court in September of that year, in connection with the hearing on relief from the bankruptcy stay.

In support of Rose's motion, Mrs. Rose submitted a brief arguing that the home could not be sold without complying with the requirements of the homestead laws,

which Fultz was "cavalierly disregarding" (CR 46 at 3). At the hearing, Rose argued the homestead laws had not been complied with, concluding (11/25/85 RT at 6) "There should be, at the very least, a stay, and, at the most, a release of the dwelling now until they go in to proceed properly." The District Court brushed aside these requests to follow California law with this rejoinder (Id. at 6):

> THE COURT: Why do we really need that? Why can't this be worked out? If the plaintiffs are correct in indicating that they have secured a willing and able buyer, $700,000 cash, that's more than what you've suggested in your papers."

The Court had the facts wrong; Rose tried to set them straight, pointing out that his 1985 appraisal had been $800,000 cash. But the Court still refused to order a homestead hearing or consider the indefinite stay requested by Rose. Instead, Rose was granted a stay, but only for 90 days, and only to see if he "can

come up with something better. If not, then we'll go ahead with the $700,000" (11/25/85 RT at 10).

A few days after the 11/25/85 hearing, Mr. and Mrs. Hawkins increased their offer to $750,000, and Fultz requested that the stay be ended so she could accept. The Court refused, permitting the stay to continue for the full 90 days.

During those 90 days, Rose did not try to "come up with something better". Instead, he made the alternate motions described at 9-10 above, persisting in his efforts to save the property by seeking a an indefinite stay, or in the alternative the enforcement of his rights under California law. Those efforts were unsuccessful, an the District Court made the order of 3/7/85 (App. B at 44a-51a), providing for a private execution sale to Fultz so she could resell to Mr. and Mrs. Hawkins. That was the order appealed from here.

At the 3/3/85 District Court hearing on Rose's motions, Fultz disclosed that she had reached an agreement with Mrs. Rose, under which (1) Fultz would release her levy as to Mrs. Rose; and (2) Mrs. Rose would sell to Fultz, by quitclaim deed, her half interest in the Rose home, for the sum of $45,000 (the amount of the homestead exemption that Rose and/or Mrs. Rose might have been awarded if there had been a homestead hearing under California law.

The 3/7/85 order accepted Fultz' bid (as a credit against her judgment, under CCP 701.590, App. A at 12a) of about $321,00), calculated as the difference between a $750,000 selling price and a total of about $429,000 in prior liens; the prior liens were paid off out of the proceeds of Fultz' resale, but a lien that was a few weeks subsequent to Fultz' lien was not.

The 3/7/85 order recited (App. B at 46a) that $750,000 was "the appraised market value of the property." The only $750,000 in the record was then more than two years old, and both sides had submitted higher appraisals for a September 1985 bankruptcy hearing. Even those higher appraisals ($800,000 and 765,000) were about six months old at the time of the hearing, seven months old at the time of the Marshal's deed to Fultz in April, and eight months old when Fultz' resale was consummated in May of 1986.

Thus there was no current appraisal (as would have been required by the homestead law), although 1985-86 was a period of falling interest rates (as found by the Court, App. B at 46a) and resulting higher home values in California.

Within a week after filing his notice of appeal for the 3/7/85 order, Rose filed a "Motion for Order Enforcing Rose's Right

to California Automatic Stay, . . . [FRCP 62(f); Cal. CCP 916(a)]" (CR 79). The motion contended the stay was automatic under California law, "because the March 7 Order does not require Rose to do anything, and because he is neither in possession nor in control of the real property that is the subject of the order" (CR 79 at 5). Rose further stated that he was requesting an order, although the stay was automatic, and not a matter of discretion or court order, because "we would like to have a court order to show to the Marshal, to Fultz, or to any third person, so they will not have to take our word that the March 7 Order is stayed" (CR 79 at 5). In a supporting declaration (CR 78 at 1-2), Rose said he was neither in possession nor in control of the home, which was in the sole possession of Mrs. Rose.

The motion was heard and denied on 4/18/86. In responding to it on that

date, Fultz contended the motion was too late, disclosing that the Marshal's deed to her had been recorder on April 9 (two days after Rose filed the appeal and notified the Marshal of the automatic stay, by personal delivery of a written notice to the Marshal, with a copy to Fultz' counsel by Express Mail.

The District Court denied the motion by Minute Order of 4/18/86 (CR 82), ruling that "Sec. 917.1 applies", referring to CCP 917.1 (App. A at 40a), under which the perfecting of an appeal does not automatically stay enforcement of a money judgment. At the hearing, the District Court also said that it doubted that it still had jurisdiction over the motion, because of the transfer to Fultz on April 9.

Rose did not attempt to appeal that ruling, but did argue (in his appeal to the Ninth Circuit, from the March 7 Order) that the automatic stay was among the laws

under which he was entitled to relief in that Court.

In dismissing the appeal as moot, the Ninth Circuit order stated (833 F.2d at 1380):

> Fultz sold the Rose property to Mr. and Mrs. Hawkins in compliance with the district court's March 7, 1986 order. Because Mr. and Mrs. Hawkins are not parties to this action, we are no longer able to grant any effective relief from that order or to reach the merits of this appeal.

As part of the same order (Ibid.), the Ninth Circuit vacated the District Court's March 7 Order, but did so nonretroactively, so the vacation would have "no legal effect on actions or conduct already undertaken in reliance on or under the authority of that order."

REASONS FOR GRANTING THE WRIT

A. Review Is Needed to Resolve the Conflict Between Circuits as to Whether a Resale to a Non-Party Automatically Moots an Appeal from an Order for the Sale of Property to the Judgment Creditor in a Diversity Action, Without Regard to the Continuing Possibility of Effective Relief Under State Law.

Rose seeks review of an important question of mootness on appeal, as to whether a void or improper district court order, for sale of property to the judgment creditor, is insulated from appeal by resale of the property to a third person. The Fifth Circuit has correctly ruled that the appeal is not moot, so long as relief is still possible under state law. The Ninth Circuit here has rendered a decision in conflict with that correct ruling of the Fifth Circuit.

1. There is a Conflict with the Fifth Circuit, Apparently Due to the Ninth Circuit's Failure to Recognize That This Is a Diversity Action.

The Ninth Circuit's brief order here begins (833 F.2d at 1380) with a correct

statement that an appeal is moot when intervening events "leave the appellate court unable to grant effective relief." As authority for that statement, the Court cites a bankruptcy case, In re Combined Metals Reduction Co., 557 F.2d 179, 187 (9th Cir. 1977).

Without further citatation, the Ninth Circuit order proceeds to conclude that it can "no longer grant effective relief" here" because of Fultz' resale to third persons who are not parties to the action. But that result does not automatically follow in this diversity action, as it did in the Combined Metals bankruptcy appeal.

That is the distinction overlooked by the Ninth Circuit here, but correctly recognized by the Fifth Circuit in Citibank, N.A. v. Data Lease Financial Corp. 645 F.2d 333, 336 (5th Cir. 1981). Based on that distinction, the Citibank Court held

that mootness of an appeal from such an order in a diversity action depends on the law of the state in which the district court sits, based on the following analysis (645 F.2d at 336) (emphasis added):

> Relying on . . . Lee-Vac, . . . [Citibank] asserts that the intervening rights of the third party purchaser preclude this court from granting substantial relief to Data Lease and that the appeal is therefore moot. We disagree.
>
> Citibank's reliance on Lee-Vac is misplaced. That case was an appeal from an order in a bankruptcy proceeding governed by Rule 805 of the Rules of Bankruptcy Procedure, which provides in pertinent part that "[u]nless an order approving a sale of property . . . is stayed pending appeal, the sale to a good faith purchaser . . . shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser . . . knows of the pendency of the appeal." By contrast the instant case is a diversity action, and the nature of the rights created by the orders of sale . . . is determined by the law of Florida. Erie R.R. v. Tompkins, 304 U.S. 64 . . . (1938). It is to that law that we must turn to determine whether the subsequent sale vested the third party purchaser with rights that would not be affected by a reversal of either the sale or the confirmation order.

Thus the hasty conclusion of Ninth Circuit here conflicts with the reasoned conclusion of the Fifth Circuit in Citibank. The Supreme Court should resolve that conflict by adopting the Citibank rule. The judgment creditor's resale should not automatically moot an appeal. The judgment debtor must not be deprived of his right to appeal a void or improper sale order, if--as here and in Citibank--relief is still possible under state law.

2. Here Relief Is Still Possible Under California Law.

a. In California, a Purchaser from the Judgment Creditor Gets No Better Title Than His Grantor.

Citibank went on to conclude that the appeal was not moot under Florida law. However, because there was no Florida law on the precise point at issue, the Fifth Circuit turned to "the clear weight of authority" elsewhere, as exemplified by the California case that is decisive here (at 645 F.2d 336-7; emphasis added):

> Turning to cases from other jurisdictions, however, the clear weight of authority is that in the absence of a statute to the contrary the reversal on appeal of an order directing the sale of property defeats the title of one who obtained the property from a party who purchased it at the judicial sale, regardless of the ground for reversal. This rule is based upon the general principle that one ordinarily cannot convey a better title that he himself has. Because the . . . purchaser's title is defeasible his grantee's title is also defeasible. See DiNola v. Allison, 143 Cal. 106, 76 P. 976 (1904); Marks v. Cowles, 61 Ala. 299 (1878). Because a reversal by this court of either of the district court's orders would defeat Citibank's purchaser's title and entitle Data Lease to possession of the stock, no aspect of this appeal is moot.

We recognize that California now has a statute under which title acquired at a judicial sale can only be defeated on certain specified grounds, rather than "regardless of the ground for reversal." But that does not change the holding for which Citibank cites Di Nola v. Allison, supra, 143 Cal. 104 (1904); here, because Fultz' title is defeasible, the title of her grantees is also defeasible. That

rule is not dependent on the grantees' knowledge of the defect.

> "The grantee is charged with notice of the deeds and documents from which he deraigns his title. When he purchases from the plaintiff in the execution he is presumed to know the course of proceedings and state of the record from which the title of his grantor proceeded, and he is presumed to know, too, that the right of the defendant is to take an appeal within the statutory period, and also the consequences of the successful prosecution of this right; and he must be supposed to purchase with reference to these things." Di Nola, at 143 Cal. 114, quoting Reynolds v. Harris, 14 Cal. 667 (1860).

Here there is no need for the Di Nola presumptions. Mr. and Mrs. Hawkins had actual knowledge of the proceedings in the

District Court, on the record of the court hearing they attended (12/16/85 RT at 7), and we long ago advised them of our contentions on this appeal.

b. A California Statute Expressly Entitles the Judgment Debtor to Relief in This Situation, by Restitution and/or Setting Aside the Sale to the Judgment Creditor.

The California statute we referred to (in the preceding section, at 31) is CCP 701.680 (App. A at 13a-14a). Under that section, Fultz' title is defeasible, because (1) "the purchaser at the sale [was] the judgment creditor" and (2) the gravamen of this appeal is to show that "the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason".

In that situation, CCP 701.680(c)(1) entitles the judment creditor to bring an action to set aside the sale. Fultz complained below that this appeal was not the

action contemplated by the statute. But a separate action should not be required to accomplish a result that can be accomplished in a direct appeal. The question could and should have been decided on this appeal, so as to "save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object." Butler v. Eaton, 141 U.S. 240, 244 (1891).

Even if we do not succeed in establishing that Fultz' title is defeasible, CCP 701.680 expressly provides that "The judgment debtor . . . may recover damages caused by the impropriety."

The possible right to damages is itself sufficient to avoid mootness of the appeal. A surviving money claim is sufficient to preserve the appeal, even if other requested relief is no longer available. Powell v. McCormick, 395 U.S. 486, 496-497 (1969).

Here Rose's damages include (1) the failure to pay him all or part of the $45,000 homestead exemption that was paid to his ex-wife, without following the California homestead procedures; (2) the failure to pay off a subsequent judgment lien, as required by the homestead law's provisions that all liens must be paid off out of the proceeds; and (3) the loss to him from the sale of the homestead at less than the minimum bid that should have been set at a proper homestead hearing, based on a current appraisal instead of the two-year-old appraisal used here.

c. The Sale Was Void; It Violated an Express Statutory Prohibition of Judicial Sale of a Dwelling, Except Pursuant to Prescribed Homestead Procedures.

Fed. R. Civ. P. 69(a) (App. A at 2a) mandates that execution on a federal judgment "shall be in accordance with the practice and procedure of the state in which the district court is held, . . ."

California's CCP 704.740(a) (App. A at 21a) provides (emphasis added):

> (a) . . . [T]he interest of a natural person in a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article.

That statute expressly forbids an exetion sale of a dwelling, without following the prescribed procedures for determining whether that dwelling qualifies as a homestead, and for affording to the homeowner the protections of the homestead law. Yet that is what happened here, despite repeated objections.

Those protections are expressions of a strong public policy to safeguard the exemptions granted to debtors under California execution laws. For example, that public policy is expressed in CCP 703.040 (App. A at 16a) (emphasis added):

> A purported contractual or other prior waiver of the exemptions provided by this chapter or by any other

> statute, other than a waiver by failure to claim an exemption required to be claimed or otherwise made at the time enforcement is sought, is against public policy and void.

Consistent with that strong public policy, and with California holdings under analogous statutes, the sale to Fultz here --in violation of an express statutory prohibition of such a sale--was void. See Van Bogaert v. Avery, 271 Cal. App. 2d 492, 495 (1969).

In the Courts below, Fultz made baseless claims that Rose had waived any homestead rights he may have had. Those claims are not relevant to the mootness question under discussion here. The merits of those claims should have been determined at the homestead hearing mandated by California law.

d. A California Statute Expressly Provides a Right to Appeal an Order for Sale of a Dwelling.

Among the protections of California homestead and execution laws, that were

ignored by the courts below, was an express statutory provision of a right to appeal the order for sale of the home. According to CCP 703.600 (App. A at 17a), incorporated in the homestead provisions by CCP 704.830 (App. A at 32a), "An appeal lies from any order made under this article . . ."

California law thus entitles Rose to this appeal, and to relief if his appeal is successful. The appeal is therefore not moot, and dismissing it for mootness deprives him of property without due process of law.

e. A California Statute Expressly Provides for an Automatic Stay of the Order Appealed from Here.

Stays in a district court are governed by Fed. R. Civ. P. 62 (App. A at 1a-2a). Rule 62(f) provides that:

> In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the

> district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state."

Rule 62(f) is applicable to a registration proceeding such as this. United States, etc. v. Home Indemnity Co., 549 F.2d 10, 14 (7th Cir. 1977). Furthermore, California is a "state in which a judgment is a lien upon the property of the judgment debtor", and here Fultz had a judgment lien on the Rose home, perfected 12/18/84. Therefore, under Rule 62(f), Rose was entitled to the same stay rights as in a California state court.

California CCP 916(a) (App. A at 39a)provides (emphasis added):

> "(a) Except as provided in Sections 917.1 through 917.9 . . ., the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, . . ."

The emphasized words show that it is the appeal itself, rather than any order of the court, which triggers the stay,

unless one of the specified exceptions is applicable. Here the March 7 Order did not require Rose to do anything, so the stay was automatic (rather than by court order), and no bond was required. Estate of Dabney, 37 Cal.2d 402, 407 (1951). No exercise of court discretion was necessary. Id., 37 Cal.2d at 408.

CCC 916(a) refers to specified statutory exceptions, but none is applicable here. CCP 917.4 (App. A at 41a-42a), relating to orders for the sale of real property, is not applicable, because Rose's declaration showed he was not in possession or control of the Rose home (Wynonah Rose was, and had been since their separation in 1983). See Witkin, 9 California Procedure (3d ed. 1985), Appeal Sec. 188, at pp. 200-201. Furthermore, the March 7 Order did not order Rose to sell, convey or deliver possession of the home. The Marshal had already levied on

his interest in March 1985, so it was the Marshal who was ordered to deed Rose's interest to Fultz.

The District Court mistakenly thought the exception in CCP 917.1 was applicable. CCP 917.1 requires a bond in a specified amount to stay a judgment or order if it "is for money or directs the payment of money". Here the original Colorado default judgment was a money judgment, but the present appeal was not from that judgment and does not affect it, or any enforcement of it other than in connection with the Rose home. Rather, the present appeal was from the March 7 Order, which is essentially "one directing the sale of real property." Owen v. Pomona Land Etc. Co., 124 Cal. 331, 334 (1899) [granting a motion to vacate and set aside the sale, and to quash the execution, and permitting that motion to be made in the appellate court].

3. If the Colorado Default Judgment Was Void, the Order for Sale of the Rose Home Was Also Void.

In his previous petition No. 87-1559, Rose seeks to establish that the Colorado default judgment was void for lack of jurisdiction. If he succeeds in that effort (either in this Court, or in some other forum, such at the Tenth Circuit or the Colorado District Court), then the orders of the California District Court (including the home sale order appealed from here), would be equally void for lack of jurisdiction.

That voidness would be a matter of federal due process, so California law could not constitutionally validate the sale. Therefore, the present appeal could not be moot unless and until that voidness issue is finally determined against Rose.

4. The Order Here Is "Capable of Repetition, Yet Evading Review."

This important mootness doctrine, as well as the Supreme Court's statement of

its essential elements, were summarized recently in Johansen v. San Diego County District Council, 745 F.2d 1289, 1292 (9th Cir. 1984):

> An action is not moot if it is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 415 . . . (1911). The satisfaction of this test requires the combination of two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149 . . . (1975); . . .
>
> In this case, the "challenged action,' which was the ten-day injunction, was "too short to be fully litigated prior to its cessation or expiration." This part of the Weinstein test is often satisfied when a court order, by its own terms, expires in a few days.

Here both Weinstein tests are satisfied. As in Johansen, this order was of a duration that was simply too short to permit full litigation of the appeal. That was amply demonstrated by Fultz' successful completion of the sale and resale,

both within a few days after she had notice that this appeal had been filed. By the very terms of the order appealed from, the sale to Fultz was to be implemented "forthwith", and her resale "within 90 days of this Order" contemplated a much shorter period than the 266-day gestation period held to be sufficient in Roe v. Wade, 410 U.S. 113, 125 (1973).

As to the second Weinstein test, Rose could be subjected to the same kind of short-term order again, by the same District Court in this same action. If Rose should succeed in getting a retrial (such as in his pending Tenth Circuit Appeal, or from this Court in No. 85-1559), and if Fultz gets another judgment on remand and Rose then owns a home in California, Rose could again be deprived of homestead rights by an order that could not be appealed before it had been carried out.

B. Review Should Be Granted, in the Exercise of the Power of Supervision, to Correct and Prevent the Deliberate Refusal to Follow Applicable State Law.

The threat of depriving debtors of their homestead rights, by federal courts that refuse to obey state law, is important enough to warrant review here.

Unfortunately, here that threat has become reality. The District Court not only refused to follow the homestead laws of California--it did not even permit the public auction required for an execution sale of any property. The Ninth Circuit tacitly condoned that lawlessness, by refusing to even rule on it once it had been consummated by Fultz' resale.

We have already seen that Fed. R. Civ. P. 69(a) requires federal district courts to follow execution "practice and procedure of the state in which the district court is held."

Federal courts are not above the law of

the states in which they sit. Such flouting of the law should not be countenanced by the Supreme Court. In the exercise of its power of supervision, this Court can and should promptly squelch any such flouting of the federal and state rules of execution.

C. Review should be granted, to establish a rule that a judgment debtor who cannot afford a full stay may stay the execution sale of his family home by proposing and performing a plan that preserves the equity that will be available for execution if the plaintiff wins the appeal.

Here the District Court refused to consider Rose's motion for an indefinite stay of the sale of the home. Although the sale order contained findings, none of them addressed the issues relevant to the granting of the partial stay requested here. See, e.g. United States v. Kurtz, 528 F.Supp. 1113, 1115 (E.D. Pa. 1981).

A plaintiff-appellee is not entitled to immediate payment, but rather to protection of her ultimate right to recover if she prevails on appeal. Federal Prescription Service v. American Pharmaceutical Assn., 636 F.2d 755, 761 (D.C. Cir. 1980).

There is not much law on this important question, and guidance from the Supreme Court is needed to protect homeowners from abuses such as those imposed here.

If certiorari is granted, Rose will address this question at length in his brief on the merits.

CONCLUSION

For these reasons, certiorari should be granted.

Respectfully submitted,

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